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AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS: A NEW DEPARTURE

The Supreme Court has spoken on agricultural cooperative activity and the antitrust laws in a case that is representative of the conflict between congressional policies seeking to preserve a competitive business economy, and those seeking to obtain better returns for farmers through the medium of collective marketing.¹ That case is *Maryland & Va. Milk Producers Ass'n, v. United States*.²

The result of the decision is an expression in unequivocal terms that Capper-Volstead cooperatives are not privileged to engage in trade practices and methods of competition forbidden to business corporations. This position marks a substantial departure from the Court's previous expression in *United States v. Borden Co.*³

This note is an effort to analyze the *Borden* and *Maryland & Virginia* cases, to determine the position of the federated cooperative in view of the *Maryland & Virginia* decision, and to analyze the position of agricultural cooperatives in the face of monopoly prohibitions.

Our basic idea of government is that public agencies will act in accord with law that may be known in advance by citizens. It is difficult to read the Court's decision in this case [Chenery] without getting the impression that, within broad spheres of regulatory power, it now regards administrative agencies as laws unto themselves.

1. Brief for Plaintiff, p. 28, *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

2. 362 U.S. 458. (1960).

3. 308 U.S. 188 (1939).

In *Borden*, a producer's cooperative was charged with participating in a combination and conspiracy of milk distributors, a milk drivers union, and municipal officials to restrain interstate commerce in fluid milk in violation of section 1 of the Sherman Act.⁴ The cooperative allegedly entered into a price fixing agreement with the distributors and refused to supply those distributors who failed to adhere to the agreed price.⁵ The Supreme Court unanimously held, that Section 2 of the Capper-Volstead Act⁶ gave the Secretary of Agriculture auxilliary jurisdiction only, and that nothing in Section 2 of the Act⁷ authorized price-fixing conspiracies between agricultural cooperatives and "others."⁸

Thus the Supreme Court rejected the popular belief that Capper-Volstead cooperatives enjoyed *absolute* immunity from antitrust prosecution.⁹ Instead, the Court concluded that activities of agricultural cooperatives in conjunction with "other persons" were not beyond the ambit of the antitrust laws. The question remained, however, whether

4. "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is declared illegal." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

5. *United States v. Borden Co.*, 28 F. Supp. 177 (W.D. Ill. 1939). The combination was also charged with fixing prices to be paid independent producers and restricting the supply of milk into Chicago. The District Court held, in part, that Capper-Volstead exempted co-operatives from the prohibitions of the Sherman Act and that § 2 of the Capper-Volstead Act gave the Secretary of Agriculture primary jurisdiction over cooperative activity.

6. Capper-Volstead Act § 2: "If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof [he may direct such association, after a "show cause" hearing,] . . . to cease and desist from monopolization or restraint of trade. . . ." If an association fails to comply with the Secretary's order, enforcement passes to the Department of Justice. 42 Stat. 388 (1922), 7 U.S.C. § 292 (1958).

7. Capper-Volstead Act § 1: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: that no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second: that the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: that the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members." 42 Stat. 388 (1922), 7 U.S.C. § 291 (1958).

8. See generally Notes, 27 VA. L. REV. 674 (1941), 88 U. PA. L. REV. 493 (1940).

9. The confusion seems to have stemmed from an opinion of the Attorney General 36 OPS. ATTY. GEN. 326, 333 (1930). Portions of the legislative history also gave support to the proposition. See footnote 29 *infra*.

Borden was a definitive statement of the extent of cooperative privilege or merely a limited scope opinion. The *Maryland & Virginia* case provides the answer to this question. Although aspects of *Maryland & Virginia* were analogous to *Borden*, the case was not resolved by application of the "other persons" principle. Rather, the Court promulgated a new departure in the realm of permissive cooperative activity in the process of definitively stating the extent of the privilege conferred on agricultural cooperatives by the Capper-Volstead Act and Section 6 of the Clayton Act.¹⁰

At the time of trial, the Maryland & Virginia Milk Producers Association (hereinafter referred to as the Association) was composed of 1,950 dairy farmers who produced 86% of the milk consumed in the District of Columbia, and 45% of the milk consumed at military establishments in the area. Of the twelve dairies in the locale, all but four purchased the bulk of their supply from the Association.¹¹ It was the purchase of the largest of these independent distributors, the Embassy Dairy, that motivated the Department of Justice to charge violations of Section 3 of the Sherman Act¹² and Section 7 of the Clayton Act.¹³ Embassy had sold to government establishments over 47% of all government purchases and accounted for 9.5% of the milk sales in the Wash-

10. Clayton Act § 6: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 17 (1958).

11. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 804 (D.D.C. 1958). The Association was the only Capper-Volstead Cooperative serving Washington, D. C.

12. Sherman Act § 3: "Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the U.S. or in the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states of the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is declared illegal." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 3 (1958).

13. Clayton Act § 7: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by [certain administrative agencies] . . . or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

ington area.¹⁴

The Association was troubled in 1953 by a surplus of milk, which by 1954 had caused a substantial decrease in the blend price.¹⁵ In an attempt to alleviate this situation, an assistant secretary of the Association contacted the owner of Embassy and offered to sell him some of the surplus. Embassy's owner declined. Instead, he offered to sell Embassy to the Association.¹⁶ After considering the proposal, the Association's officers sent member producers a memorandum that stated, in part, that the purchase would be beneficial in that it would eliminate the area's most notorious advocate of the practice of importing uninspected surplus milk from other markets.¹⁷ Another benefit noted was that the replacement of milk from other areas with Association milk would decrease the Association's surplus and increase its blend price. An increase in the Association's membership of some sixty to seventy producers (out of the one hundred and twenty-two selling to Embassy) was also anticipated.¹⁸

The Government's case included proof that the Association paid almost double the value of the assets—over \$2,940,000 for fixed assets having a value of approximately \$1,600,000.¹⁹ Another factor in the transaction was an agreement by Embassy's owner that he would not compete in the Washington area for ten years; and that he would attempt to persuade the independent producers who supplied him to either sell to distributors who purchased from the Association or join the Association.²⁰

Another aspect of the case raised the question as to how far anti-

14. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 804 (D.D.C. 1958). As a result of the transaction the Association was in a position to supply 95.5% of the milk consumed in the Washington area, and 92% of the milk consumed at local government establishments.

15. Brief for Defendant, p. 9, citing Record, p. 378. The blend price is generally determined by averaging the receipts from the three use classifications into which milk generally is divided. Class I is composed of milk resold by distributors as fluid milk, and of course provides the highest cash returns. Class II is composed of milk manufactured into cream and chocolate milk. Class III is composed of unsold or surplus milk which each distributor has on his hands and which he sells for manufacture into by-products such as ice cream, cheese, condensed evaporated milk, and other dairy commodities." Surplus milk is a serious problem everywhere because the prices which can be realized for it are much less than the prices realized for milk and cream sold for consumption in fluid form." Hanna, *Cooperative Milk Marketing and Restraint of Trade*, 23 Ky. L.J. 217, 239 (1935). For a case upholding the validity of the classified use plan see *Maryland & Va. Milk Producers Ass'n v. United States*, 193 F.2d 907 (D.C. Cir. 1951) reversing 90 F. Supp. 681 (D.D.C. 1950).

16. Brief for Defendant, p. 10, citing Record, p. 384.

17. The practice is known in the trade as "bootlegging."

18. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 805, 806 (D.D.C. 1958).

19. Brief for Plaintiff, p. 8 citing Record, p. 558.

20. Brief for Plaintiff, p. 9, citing Record, p. 590.

trust policy had been qualified by Acts of Congress, in addition to the Capper-Volstead and Clayton Acts. The Baltimore Bank for Cooperatives authorized by the Agricultural Marketing Act of 1929 to make loans to cooperatives for "the construction or acquisition of physical facilities,"²¹ lent the Association \$2,100,000 for the purchase of Embassy.²² The Report of the Bank's secretary, which recommended the loan, stated that the Association wanted to eliminate "an unstable influence" from the market, and obtain another outlet for its surplus milk.²³ The Report relied, in part, upon an analysis of the economic desirability of the Embassy acquisition which the Bank, upon request, had obtained from the Department of Agriculture.²⁴

The *Maryland & Virginia* case would appear to be factually similar to the *Borden* case as to the Sherman section 3 and Clayton section 7 charges arising from the Embassy transaction. Both involved a restraint of trade as a result of a combination of an entity operating under the provisions of the Capper-Volstead Act with one (or more) non-cooperative entities. Furthermore, the problem in both cases was to determine how far Congressional cooperative policies were intended to modify Congressional antitrust policies. The fact that *Borden* involved a loose combination and *Maryland & Virginia* a merger, would not seem to warrant a distinction in treatment insofar as the application of "other persons" was concerned. Nor are mergers in restraint of trade anymore condemned under the antitrust laws than price fixing.²⁵ One distinguishing factor of importance was that, unlike *Borden*, the Court also had to contend with the District Courts dismissal of a charge of monopolization and attempted monopolization in violation of section 2 of the Sherman Act.

But the Court did not rest that part of its decision analogous to the

21. 46 Stat. 14, as amended, 12 U.S.C. § 1141e (1958).

22. The Association financed the remainder of the purchase by borrowing \$750,000 from local banks, \$407,000 from its members, and utilizing \$748,000 of its own funds. Brief for Plaintiff, p. 8, citing Record, p. 620.

23. Brief for Defendant, p. 11, citing Record, p. 574.

24. The study was made by Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, United States Dep't. of Agriculture. The study stated, in part, that although the Association seemed to under emphasize the problems of the transaction and over emphasize the potential benefits, the Embassy purchase would provide it with an "unusual opportunity" to increase its blend price. Brief for Defendant, p. 11, citing Record, p. 717.

25. Price-fixing is illegal [per se] under the antitrust laws. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). For cases applying the "new" § 7 of the Clayton Act see *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958), *affirming* 152 F. Supp. 387 (S.D.N.Y. 1957).

Borden case on the "other persons" doctrine.²⁶ Mr. Justice Black, speaking for a unanimous Court, stated,

The full effect of section 6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out the legitimate objects thereof,' but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will.²⁷

Moreover, the Court stated that the philosophy of section 6 of the Clayton Act and the Capper-Volstead Act is that farmers acting through cooperatives should be given "the same unified competitive advantages—and responsibility—" as businessmen acting through corporations.²⁸ (Emphasis added.) The opinion pointed out that a class privilege was not intended²⁹

26. This was the basis on which the District Court denied the Association's motion to dismiss the Sherman § 3 and Clayton § 7 charges and granted its motion as to the Sherman § 2 charge. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 45 (D.D.C. 1958).

27. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 465, 466. For similar interpretations of § 6 see *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921); *United States v. King*, 250 Fed. 908, 910 (D. Mass. 1916). Some may contend that the opinion holds only those trade practices and methods of competition that can be styled "predatory" as outside the "legitimate objects" of a Capper-Volstead cooperative. This would be to suggest that the Court has promulgated special standards for an exempt class under the antitrust laws similar to those found in the history of labor law legislation. In the light of the entire opinion such a position seems misleading, and a last ditch attempt to give new life to the concept of a class privilege for agricultural cooperatives. Any restraint of trade can be termed "predatory." In addition, cooperatives are amendable to standards gauging the conduct of business corporations. Thus, the concept of special standards for agricultural cooperatives is unnecessary as well as unrealistic.

28. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466. In addition the Court pointed out: "In the *Borden* case this Court held that neither § 6 of the Clayton Act nor the Capper-Volstead Act granted immunity from prosecution for the combination of a cooperative and others to restrain trade there charged as a violation of § 1 of the Sherman Act. Although the Court was not confronted with charges under § 2 of the Sherman Act in that case, we do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the anti-monopolization provisions of § 2 of the Sherman Act while making them responsible for such practices as violations of the anti trade restraint provisions of §§ 1 and 3 of that Act. These sections closely overlap and the same kind of predatory practices may show violations of all." 362 U.S. 458, 463. For cases manifesting a contrary view see *United States v. Maryland Co-op. Milk Producers Ass'n*, 145 F. Supp. 151 (D.D.C. 1956); *Farmers Co-op. Co. v. Birmingham*, 86 F. Supp. 201, 229 (N.D. Iowa 1949) (dictum); *United States v. Dairy Co-op. Ass'n*, 49 F. Supp. 475 (D. Ore. 1943); *United States v. Elm Spring Farm, Inc.*, 38 F. Supp. 508, 511 (D. Mass. 1941) (dictum); *modified on other grounds*, 127 F.2d 920 (1st Cir. 1942).

29. Senator Capper stated, "The . . . bill . . . seeks simply to make definite the law relating to cooperative associations of farmers and to establish a basis on which these organizations may be legally formed." 62 CONG. REC. 2057 (1922). Representative Volstead pointed out, "It is objected in some quarters that this repeals the Sherman . . . Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combinations may or

and that the legislative history, "does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own business in their own legitimate way."³⁰ The Court concluded, "We hold that the privilege Capper-Volstead grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competitors."³¹

Given the similarity between the *Borden* and *Maryland & Virginia*

may not monopolize or restrain trade." 61 CONG. REC. 1033 (1921). The House Judiciary Report concluded, "Instead of granting a class privilege it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. H.R. Doc. No. 24, 67th Cong., 1st Sess. 2 (1921), 59 CONG. REC. 8033 (1920). On the other hand, a number of congressmen felt a class privilege would result from the bill. 59 CONG. REC. 7857, 7858, 8054 (1920) and 61 CONG. REC. 1042 (1921). It is interesting to note also that the appropriations acts for the Department of Justice between 1914-1928 contained the following: ". . . no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products." Farmers Cooperative Service, U. S. Department of Agriculture, Bulletin No. 10, *Legal Phases of Farmer Cooperatives* 250 (1958). Unfortunately, the Secretary of Agriculture has failed to institute an action since Capper-Volstead became law. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 313 (1955). It is safe to say that even those congressmen who felt that § 2 would place enforcement responsibility in the Secretary of Agriculture didn't intend total immunity.

30. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466, 467. In affirming the § 7 judgment, the Court agreed with the District Court that the acquisition tended to create a monopoly or substantially lessen competition. The opinion reiterated the District Court's findings that "the motive and result of the Embassy acquisition was to: eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or ship to Baltimore, thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract milk bidding; and increase the Association's control of the Washington market." 362 U.S. 458, 469. The § 3 charge was decided on the evidence offered on the Clayton § 7 charge. The Supreme Court considered "crucial" the agreement not to compete and the promised aid in obtaining Embassy's suppliers. The rivalry between Association and Embassy producers, and the price paid for Embassy were also stressed. No mention was made in the opinion of the role played by the Baltimore Bank for Cooperatives or the Department of Agriculture. In referring to the Sherman § 3 judgment, the opinion pointed out that the facts found by the District Court show a "classic combination or conspiracy to restrain trade" that found no justification in the "necessary contracts" provision of the Capper-Volstead Act. "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that their purchase simply for business use, without more, often would be permitted and would be lawful under Capper-Volstead. But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act. The contract . . . was not one made merely to advance the Association's own permissible processing and marketing business; it was entered into . . . because of its usefulness as a weapon to restrain and suppress competitors and competition in the Washington . . . area." *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 471, 472.

31. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 472 (1960).

cases, the Court could have rested its decision on the "other persons" doctrine of *Borden*. It is submitted that cooperative reliance on *Borden* far exceeded its scope and that the concept of a class privilege—in the absence of a clear Congressional expression—is repugnant to a philosophy that seeks responsible behavior from those who deal in the market place. There is nothing in the statutory framework³² that permits cooperatives acting independently of the Secretary of Agriculture to engage in price fixing activity with distributors. Thus, the *Borden* Court stated that the activity was not *authorized*. In reaching this conclusion the opinion emphasized the privileged-non-privileged nature of the combination because that was the basis of the District Court's decision as to the cooperative—not the legality of price fixing. The *Maryland & Virginia* case, however, involved activity that is authorized, *i.e.*, by the necessary contracts provision of the Capper-Volstead Act. The Court therefore had to decide whether antitrust violations were *justified* by the authorization.

In the process of holding that immunity has not been granted to cooperative activities where similar activities by a business corporation would violate the antitrust laws, the Court has provided the much needed statement of the nature of the privilege granted to cooperatives by the Capper-Volstead Act and section 6 of the Clayton Act. The reinstatement of the Sherman section 2 charges emphasized the new departure in the realm of permissive cooperative behavior under the antitrust laws: Capper-Volstead cooperatives are not privileged to indulge in trade prac-

32. In addition to § 6 of the Clayton Act and the Capper-Volstead Act, the following also deal with agricultural cooperation. The Cooperative Marketing Act of 1926 authorized the establishment of a Division of Cooperative Marketing in the Department of Agriculture. The Division is authorized, in part, to obtain, analyze, and distribute information concerning cooperatives; conduct and publish studies of the various phases of cooperation; analyze cooperative transactions upon request; publish information concerning market conditions; and to advise groups desirous of forming cooperatives. The Act also provides that cooperatives may exchange "crop, market, statistical, economic, and other similar information [directly] and/or by and through a common agent created or selected by them." 44 Stat. 802, 7 U.S.C. § 451-57 (1958).

The Agricultural Marketing Act of 1929 directs that the Congressional policy of regulating the marketing of agricultural commodities "so that the industry of agriculture will be placed on a basis of economic equality with other industries," should be carried out in part, by reducing speculation, precluding "wasteful and inefficient" distribution, utilizing "orderly production and distribution" to prevent and control surpluses and extensive price fluctuations, and by "promoting the establishment and financing" of agricultural cooperatives. Authorization is also given to an agency of the Department of Agriculture to make loans to cooperatives for physical expansion purposes. 46 Stat. 11, 12 U.S.C. § 1141 (1958).

The Agricultural Marketing Agreement Act of 1937, in part, authorizes the Secretary of Agriculture to enter into regional price-determining marketing agreements with producers and handlers of agricultural commodities. Where such an agreement cannot be reached, the Secretary is authorized, upon the consent of a prescribed number of those involved to issue marketing orders that set minimum prices to be paid by distributors to producers. 50 Stat. 246, 7 U.S.C. § 601-59 (1958).

tices and methods of competition forbidden to business corporations.³³

The conclusion is inescapable that responsible cooperative behavior is the message of *Maryland & Virginia*. In addition to the tenor of the opinion, the Court condemned combination with competitors to suppress competition and cited the *Maryland Cooperative*³⁴ case, a case that held two competing Capper-Volstead cooperatives privileged to engage in price fixing. This type of combination was thought, by some, to be sacrosanct after the *Borden* decision. Therefore, by condemning anti-trust violations arising from a combination with competitors—or by the cooperative itself—as outside the legitimate objects of a Capper-Volstead cooperative, “other persons” has been given its broadest meaning³⁵ and the limitations and uncertainty *Borden’s* specifically engendered have been mitigated. Even the most cursory consideration of the statutory scheme impresses one with the fact that Congress has sought to nurture agricultural cooperation.³⁶ Needless to say, during the formative years of these producer associations such treatment was necessary.³⁷ However, agricultural cooperation has passed from a formative period to one of maturity and strength,³⁸ and responsible cooperative activity must be a

33. This conclusion has been anticipated by writers in the area. See, Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. (1960); Mischler, *Current Legal Developments Affecting Farmer Cooperatives*, AMERICAN COOPERATION 474 (1960); Hanna, *Cooperative Associations and the Public*, 29 MICH. L. REV. 148 (1930); Note, 57 MICH. L. REV. 921 (1959); Note, 27 VA. L. REV. 674 (1941). But see, Stark, *Capper-Volstead Revisited*, AMERICAN COOPERATION 464 (1960).

34. *United States v. Maryland Co-op. Milk Producers Inc.*, 145 F. Supp. 151 (D.D.C. 1950). See text at notes 33 *supra* and 40-43 *infra*.

35. “Other persons” means many things to many people. To Judge Holtzoff it meant non-Capper-Volstead Cooperatives. To the Association it meant persons not involved in agricultural activity. Brief for Defendant, p. 3, *Maryland & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458 (1960). In the labor law area “other persons” has been confined to a prohibition against combinations of unions with employers or self-employed. *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945).

36. The Supreme Court has indulged in nutriment of sorts as well. In *Liberty Warehouse Co. v. Burley Tobacco Growers Co-op.*, 276 U.S. 271 (1928), a Kentucky statute that prohibited warehousemen from purchasing produce from cooperative members was held not to be an impairment of the warehousemen’s freedom of contract. When a statute purporting to exempt farmers from criminal antitrust sanctions was challenged as being violative of equal protection in *Tigner v. Texas*, 310 U.S. 141 (1940); the Court overruled its previous decision in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), and held the classification reasonable.

37. During the debate on the Capper-Volstead Act, one Senator stated, “. . . those who do not want the organization, the men who have the business now, the middlemen who are standing between the producer and the consumer and taking their toll, discourage the organization of these . . . associations by the suggestion that they will be in violation of law.” 61 CONG. REC. 2165 (1921). “The efforts of farmers to engage in joint marketing operations have from the first incurred active opposition from the commission merchants whom cooperative selling would replace.” Jenson, *Cooperative Corporation Law On the Marketing Transaction*, 22 WASH. L. REV. 1, 11 (1947).

38. There are approximately 9800 cooperatives in the United States today with a total membership in excess of 7.6 million. Hill, *Agricultural Cooperatives and the FTC*,

concomitant. The independent agriculturalist whose products are excluded from the market does not benefit from an attitude which favors continued or additional nutriment of established cooperatives. He requires nutriment today. The application of antitrust prohibitions to the trade practices and methods of competition of agricultural cooperatives will provide this nutriment on the one hand, and mature behavior on the other. This certainly is consistent with Congressional agricultural cooperative policy and the spirit of the cooperative movement.³⁹

In the *Maryland Cooperative* case,⁴⁰ two competing Capper-Volstead cooperatives were held privileged to engage in a conspiracy to fix prices for milk sold to distributors effectuated by employees common to both cooperatives. The case raised the serious question of whether the activity of a pair of cooperatives violates the antitrust laws where a similar combination of business corporations would indubitably do so. The opinion limited *Borden's* "other persons" doctrine to non-Capper-Volstead cooperatives and concluded that as a result of section 6 of the Clayton Act cooperatives may "combine with impunity" and "legally agree to fix prices on their products." Moreover, the Court felt that Congress must have foreseen that the privileged common marketing agency of Capper-Volstead and common agent of the Cooperative Marketing Act of 1926 would lead to price fixing, although neither was involved in the case.⁴¹ Clearly the *Maryland Cooperative* case is out of step with *Maryland & Virginia*. To be sure, two cooperatives were not involved in the latter but, as indicated earlier, the opinion implied disapproval of *Maryland Cooperative* in its condemnation of a combination of competitors to suppress independent producers, processors, or dealers. Moreover, in the light of *Maryland & Virginia* it is difficult to contend that Capper-Volstead and section 6 of the Clayton Act grant agricultural cooperatives the right to conduct their affairs with impunity.

AMERICAN COOPERATION 444 (1960). In the dairy cooperative field, ". . . Statistics recently reported . . . show that in 1957 dairy cooperatives marketed almost 60% of all whole milk sold by farmers to plants and dealers in the U.S. . . . Cooperatives now manufacture 58% of all creamery butter, 23% of the cheddar cheese, 74% of the non-fat dry milk, and 70% of the dry buttermilk produced in the U.S." *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960). Brief for Defendant, p. 84, 87, citing Gessner & Krause, *Dairy Cooperatives Report on Integrated Activity*, NEWS FOR FARMER COOPERATIVES (Feb. 1959) p. 12 (Emphasis added.)

39. For a criticism of the Court's decision see Stark, *Capper-Volstead Revisited*, AMERICAN COOPERATION 453 (1960).

40. *United States v. Maryland Co-op. Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956). The Maryland and Virginia Milk Producers Association was co-defendant. The Court granted the defendants' motion for acquittal.

41. The Department of Justice so contended, Note, 44 VA. L. REV. 63, 72 citing transcript of Record, p. 65, but apparently its argument was ignored.

An examination of the extent and nature of the privilege conferred by the common agent provision is important. Section 455 of the Co-operative Marketing Act of 1926 provides that cooperatives may exchange "crop, market, statistical, economic and other similar information [directly] and or by and through a common agent created or selected by them."⁴² The *Maryland Cooperative* opinion stated that the use of a common agent would "inevitably" lead to price fixing. Be that as it may, no price fixing privilege was granted and it is rather difficult to read such a privilege into the section. It may well have been passed to insure to cooperatives that which the Supreme Court determined in the early trade association cases, *i.e.*, that such information may freely be exchanged where no attempt is made to reach any agreement concerning prices, production, or restraint of competition.⁴³ It is extremely doubtful that section 455 grants any greater privilege to cooperatives. Thus it seems unlikely that a loose combination of cooperatives has any greater privilege under the antitrust laws than a similar combination of business corporations.

Cooperative mergers may require different treatment. It would seem that the competitive market would be little affected where two or more cooperatives, primarily dealing with the products of their members, merge

42. 44 Stat. 803, 7 U.S.C. § 455 (1958).

43. "Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them for the simple reason that the Sherman Act neither repeals economic laws nor prohibits the gathering and dissemination of information. . . . Trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation . . . and who . . . meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 363 (1925); *accord*, *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914); *cf.* *Sugar Institute Inc. v. United States*, 297 U.S. 553 (1936). This is not to forget that these privileges may be termed an unfair method of competition under § 5 of the Federal Trade Commission Act. In *FTC v. Cement Institute*, 333 U.S. 683 (1948), the Court distinguished the "old" *Cement* case and the *Maple Flooring* case on the grounds that no attempt to fix prices was proven there, and that conduct while not violating the Sherman Act may constitute an unfair method of competition prohibited by § 5. Thus cooperatives, which are also under the FTC jurisdiction, have a substantial privilege.

into one.⁴⁴ In addition, section 6 of the Clayton Act guarantees the existence of producers' associations and this would seem to militate against the disallowance of such mergers under section 7 of the Clayton Act. The trade practices and methods of competition of the merged cooperative, however, would not be immune under the antitrust laws. Thus, maximum benefit would seem to inure to cooperatives, independent producers, and consumers.

Federated cooperatives are centralized marketing agencies in which the local cooperatives hold stock. Although they are not expressly mentioned in the Capper-Volstead Act, their existence is authorized by the language of the Act.⁴⁵ The utilization of such an authorization confers a substantial privilege on agricultural cooperation. As Judge Holtzoff observed in the *Maryland Cooperative* case, Congress must have contemplated that a common marketing agency would fix the same prices for the products of all its principals and would not discriminate among them.⁴⁶ The extent of the privilege can best be measured by reference to antitrust cases dealing with such agencies.⁴⁷ It is a fair conclusion that non-privileged marketing agencies are permissible under the Sherman Act only where "the group must meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices."⁴⁸

Needless to say, many federated cooperatives would not meet these requirements. However, these cooperatives are entirely in accordance with the Capper-Volstead Act and the declared policy of Congress to "promote the effective merchandising of agricultural commodities."⁴⁹ In addition, the undue enhancement provision of section 2 of the Capper-

44. As Judge Holtzoff has observed, "It seems immaterial whether a large group of farmers organizes a single organization or divides itself into several organizations." *United States v. Maryland Co-op. Milk Producers Ass'n*, 145 F. Supp. 151, 154 (D.D.C. 1956) (dictum). See generally, Stark, *Capper-Volstead Revisited*, *AMERICAN COOPERATION* 453 (1960); Givens, *Affirmative Benefits of Industrial Mergers and Section 7 of the Clayton Act*, 36 *IND. L.J.* 51 (1960).

45. Mischler, *Agricultural Cooperative Law*, 30 *ROCKY MT. L. REV.* 381 (1958); *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 308 (1955); Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 *ROCKY MT. L. REV.* 181 (1948); 36 *OPS. ATT'Y GEN.* 326 (1930). In addition federated cooperatives are specifically mentioned in § 453 of the Cooperative Marketing Act of 1926. 44 Stat. 802, 7 U.S.C. § 453 (1958).

46. 145 F. Supp. 151, 154 (D.D.C. 1956).

47. See, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Sugar Institute, Inc. v. United States*, 297 U.S. 533 (1936).

48. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 374 (1933).

49. The Attorney General's Committee found the validity of vertically engaged federated cooperatives "less certain." It is difficult to understand the basis of this position. Capper-Volstead provides for producer's associations throughout the marketing channel, and as long as the trade practices and methods of competition of the federated cooperative are in order, its vertical nature would not seem to militate against its validity.

Volstead Act precludes abuse of the privilege.⁵⁰ As to its other trade practices and methods of competition the federated cooperative would seem to have no more immunity than the business corporation.

Prior to 1945, it would have been of little comfort to cooperative members to be informed that their associations were permitted to acquire 100% of the market, where such control was acquired without resort to restraints of trade. With the *Alcoa*⁵¹ decision, however, what has been called the "new" Sherman Act came into existence. The conclusion is inescapable that the drift toward per se standards, necessitated by the admitted inability of the courts to cope with complex economic data, has manifested itself in monopoly prohibitions.⁵² Where the courts once spoke of mere size not being an offense under the Sherman Act,⁵³ one may well contend today that overwhelming size is such an offense.⁵⁴ Although Judge Hand in his *Alcoa* opinion stated that Congress forbade all trusts, "good" and "bad," it has been pointed out that it is for Congress to determine whether a monopoly not compelled by circumstance is advantageous.⁵⁵ By sanctioning cooperative existence in section 6 of the Clayton Act, restating the privilege in the Capper-Volstead Act, and by the Agriculture Marketing Agreement Act of 1937 Congress has so determined. Thus it may be said that a cooperative may obtain over-

50. To be sure, the courts have been reluctant to look into the reasonableness of the prices fixed, but such a course would be most proper where the strength of the federated cooperative is overwhelming. Although it is doubtful that such strength exists throughout the country, "cooperative marketing corporations are coming of age, their political as well as their economic power is increasing, they are consolidating and federating. Apparently the magnetic power toward corporate efficiency tends to pull cooperative corporations along the same evolutionary path toward 'bigness' which private profit corporations have followed." Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 ROCKY MOUNT. L. REV. 181, 196 (1948).

51. *United States v. Aluminum Company of America*, 148 F.2d 146 (2d Cir. 1945).

52. For discussion of the trend, see, Kahn, *A Legal and Economic Appraisal of the 'New' Sherman and Clayton Acts*, 63 YALE L.J. 293 (1954); Adams, *The 'Rule of Reason': Workable Competition or Workable Monopoly?*, 63 YALE L.J. 348 (1954); Wood, *The Report of the Attorney General's Committee Three Years After*, 26 GEO. WASH. L. REV. 669 (1958); Oppenheim, *Federal Antitrust Legislation: Guidepost to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

53. *United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918). *But see*, *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Reading*, 253 U.S. 26 (1920).

54. See, *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), *aff'd per curiam by an equally divided Court*, 330 U.S. 806 (1947).

55. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

whelming power without running afoul of the "new" Sherman Act because of that power. The question remains, how may such a position be attained?

In the realm of permissive cooperative monopoly nothing is more certain than the validity of marketing orders or agreements involving the Secretary of Agriculture and local producers. Any monopoly that might result has the express approval of Congress and the Supreme Court.⁵⁶

A monopoly position properly may be attained in another manner. Judge Wyzanski stated in the *Cape Cod* case, "It is not unlawful under the antitrust acts for a Capper-Volstead cooperative to try to acquire even 100% of the market if it does it exclusively through marketing agreements approved under Capper-Volstead, skill, superiority of products, efficiency or like laudable steps."⁵⁷ This is consistent with the position of the Department of Justice that the Capper-Volstead Act "legitimizes no more than securing such control over local supply as results from voluntary membership in an association by the local producers or most of them. Any control over supply or price obtained by excluding non-member producers from the market . . . , which the association could not achieve if it acted singly in collectively marketing the product of its members, transcends the authorization of section 1 and thereby becomes subject to antitrust law prohibitions. . . ."⁵⁸

The *Maryland & Virginia* case has answered the question of how far the immunity extends. In reversing the District Court's dismissal of

56. Agricultural Marketing Agreement Act of 1937, 61 Stat. 208, 7 U.S.C. § 608b. "These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporative aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and the [marketing] order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act." The Court held the Act and the order valid. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 559, 560 (1939).

It is interesting to note that the Association utilized this lawful means of obtaining market stability. Four months after the judgments in the District Court, the Association, on behalf of its members, secured a marketing order for the Washington area. Brief for Defendant, p. 94.

57. *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954). Jury charge. This opinion is significant because Judge Wyzanski handed down the opinion in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), where although the Court found that the defendant had not obtained its position by illegal means, it was nevertheless a monopoly in restraint of trade.

58. Brief for Plaintiff, p. 13. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960). See also *April v. National Cranberry Ass'n*, 168 F. Supp. 919 (D. Mass. 1958); Report of the Attorney General's National Committee to Study the Antitrust Laws 311 (1955).

the section 2 charge,⁵⁹ the Court stated that Congress did not intend to immunize "competition-stifling practices" under section 2 of the Sherman Act while holding cooperatives responsible for restraints of trade under sections 1 and 3 of that Act. The Court added that the alleged activities "are so far outside the 'legitimate objects' of a cooperative that if proved, they would constitute clear violations of section 2 of the Sherman Act. . . ."⁶⁰ The decision, in effect, overrules the *Dairy Co-op.* decision,⁶¹ a decision that held a cooperative immune from prosecution for monopolistic practices,⁶² and one that had been termed a "baited trap."⁶³ Hence, it is apparent that the cooperative's privilege in the face of monopoly prohibitions extends only to its existence—which is quite a substantial privilege—but does not grant the right to use its position to "foreclose competitors, to gain a competitive advantage or to destroy a competitor."⁶⁴

CONCLUSION

One need not choose between supporting the *Maryland & Virginia*

59. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 45 (D.D.C. 1958). On the Defendant's motion, Judge Holtzoff dismissed the Sherman § 2 charge. In the court's opinion, it was "quite apparent" that Congress in enacting the Clayton and Capper-Volstead Acts had exempted the existence, activities and operations of agricultural cooperatives from the antitrust laws as long as combinations or conspiracies with non-agricultural producers were not involved.

60. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 468 (1960). Among the particularized acts of monopolization and attempted monopolization charged in violation of § 2 were that the Association attempted to arrange for non-member producers to sell to the Baltimore market; attempted to prevent truck transportation of non-member's milk to Washington; attempted to exclude a competitor cooperative from the Washington area; used as distributor's indebtedness to the Association to obtain his account; boycotted a distributor who operated a grain store to compel his purchases from the Association; and threatened to reduce prices to distributor customers for resale under Government contracts to prevent an independent distributor from successfully competing. Brief for Plaintiff, pp. 29-31.

61. *United States v. Dairy Co-op. Ass'n*, 49 F. Supp. 475 (D. Ore. 1943).

62. In the *Dairy Co-op.* case, the court said:

It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said that cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions. More ill-considered in fact, in view of the serious consequences to the American people now known to have followed from those decisions in the labor field.

49 F. Supp. at 475. This decision epitomizes the uncertainty that preceded and followed the *Borden* decision and an attitude that does not recognize that unlike unionism "agricultural cooperation is a method of doing business." Farmer Cooperative Service, U.S. Department of Agriculture, Bull. No. 10, Legal Phases of Farmer Cooperatives 1 (1958). See generally, Strieker v. Seafarers Sea Chest Corp., 162 F. Supp. 602, 607 (E.D. La. 1958) and cases cited footnote 28 *supra*.

63. Note, 44 VA. L. REV. 63, 82 (1958).

64. *United States v. Griffith*, 334 U.S. 100, 107 (1948).

case and the agricultural cooperative movement. The requirement that cooperatives be fair competitors certainly is not an unreasonable one. The decision, along with the natural evolution thereof, it is submitted, will insure the long run welfare of consumers, competitors, and the producer-members of agricultural cooperatives. The privileges of agricultural cooperation's infancy have been supplemented—not eradicated—by the responsibility of its maturity.